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No. 04-1247

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

RICKY BELL, WARDEN,
Petitioner,

v.

ABU-ALI ABDUR'RAHMAN.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT

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SUPPLEMENTAL BRIEF FOR RESPONDENT

Respondent Abu-Ali Abdur'Rahman respectfully submits this supplemental brief to explain why in this case the petition should be denied, rather than being granted, vacated, and remanded to the court of appeals in light of *Gonzalez*.

Question One presented by the petition in this case addresses the circumstances in which a motion under Federal Rule of Civil Procedure 60(b) is a prohibited "second or successive" habeas application. Because there is no prospect that this Court's decision in *Gonzalez* could inform, much less change, the court of appeals' disposition of that question, a GVR order would be inappropriate. This Court in *Gonzalez* held that although a "Rule 60(b) motion that seeks to revisit the federal court's denial *on the merits* of a claim for relief should be treated as a successive habeas petition," *Gonzalez*, slip op. at 9, a Rule 60(b) motion attacking "some defect in the integrity of the federal habeas proceeding[]" is not a successive application, *id.* at 8. And this Court squarely stated that the phrase "on the merits" does not encompass situations in which a movant "merely asserts that a previous ruling which precluded a merits determination was in error – *for example, a denial for such reasons as failure to exhaust [or], procedural default* * * *. Slip op. 7 n.4.

The court of appeals applied precisely these principles in this case. See Pet. App. 3a ("Abdur'Rahman's motion challenges the procedural basis on which the district court's judgment denying his habeas petition rested and, therefore, should be adjudicated pursuant to Rule 60(b)."). Compare also *Gonzalez*, slip op. at 6 (endorsing the holding of *Rodwell* v. *Pepe*, 324 F.2d 66 (CA1 2003)) with Pet. App. 11a ("We adopt the First Circuit's approach to this issue [in *Rodwell*]"). In this case, petitioner's Rule 60(b) motion challenges only the district court's determination that petitioner's prosecutorial misconduct claims were procedurally defaulted. See Pet. App. 13a ("Th[e] motion does not present a direct challenge to the constitutionality of his state court conviction.

Instead, it relates to the integrity of the federal habeas judgment and specifically, the basis for the district judge's procedural default ruling. If Abdur'Rahman's motion were granted, it would simply result in the reopening of the federal habeas proceeding, not the vacation of the state criminal judgment.").

Nor would it be appropriate to remand this case in light of this Court's analysis of whether Gonzalez's claim satisfied the "extraordinary circumstances" required for relief under Rule 60(b). As an initial matter, the petitioner in this case did not seek certiorari on that issue. But even more important, here too, the court of appeals applied precisely the standard this Court adopted in *Gonzalez*. The court of appeals recognized that "Rule 60(b)(6) has been narrowly interpreted and courts have stressed that such motions should only be raised in exceptional or 'extraordinary circumstances.'" Pet. App. 15a (quoting *Liljeberg* v. *Health Svcs. Acquisition Corp.*, 486 U.S. 847, 863-64 (1988)). And it recognized that a "change in decisional law" is not itself "an extraordinary circumstance" justifying Rule 60(b)(6) relief. See *id.* at 20a (citing *Agostini* v.*Felton*, 521 U.S. 203 (1997)).

Moreover, this Court's decision on the "extraordinary circumstances" question in Gonzalez is heavily fact-bound and does not change the underlying legal principles, which were faithfully applied by the court of appeals, in any discernible way. There simply is no analogy between the facts of *Gonzalez* and respondent's case that could reasonably change the disposition on a remand. In finding an extraordinary circumstance warranting entertainment of respondent's Rule 60(b) motion, the court of appeals emphasized the distinctive lack of any legitimate governmental interest in finding respondent's claim procedurally defaulted. The sole *federal* justification for refusing to hear respondent's claim was a presumed respect for Tennessee procedures: the district court held that respondent had failed to exhaust his claims by omitting to raise them in his petition to the Tennessee Supreme Court for

discretionary review and that, the time for raising those claims in that petition having expired, the Tennessee Supreme Court would hold the claims to be procedurally defaulted. But the "speculation supporting the district court's default finding crumble[d]," Pet. App. at 23a, when TSCR 39 firmly demonstrated, *while respondent's first habeas petition was still pending*, that Tennessee did not have, *and had never had*, any interest in precluding habeas review of respondent's claims, which the Tennessee courts would have held to have been properly preserved. See Pet. App. 23a ("Indeed, enforcing the district court's judgment in this case would disserve the comity interests enshrined in AEDPA by ignoring the state court's view of its own law."). Thus, unlike the petitioner in *Gonzalez*, respondent here is not basing his Rule 60(b)(6) motion on a claimed change in federal law.

Nor, again unlike the petitioner in *Gonzalez* did respondent show any "lack of diligence," slip op. at 12, in seeking to correct the error that wrongly denied him any adjudication on the merits. While the grounds for the Rule 60(b) motion at issue in *Crosby* were not diligently pursued, there is no question that respondent in this case pursued his right to relief with all possible dispatch once the Tennessee Supreme Court issued its clarifying Rule, a fact that respondent explained in his brief in opposition to certiorari (at 16-17) and petitioner did notably not contest in his reply.

In sum, nothing in this Court's decision in *Crosby* would inform the court of appeals' disposition of this case. The only consequences of the GVR order would be to delay the further proceedings in the district court, to put the court of appeals to the unnecessary burden of reconsidering the case, and to send confusing signals to the lower courts regarding the effect of this Court's ruling in *Crosby*. Respondent therefore respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

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